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Christopher C. Joyner
George Washington University

Wayne P. Rothbaum
George Washington University

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Christopher C. Joyner and Wayne P. Rothbaum***

INTRODUCTION

On December 21, 1988, Pan American Flight 103 took off from London's Heathrow Airport on its transatlantic flight to John F. Kennedy Airport in New York. At 6:56 P.M. EST, at an altitude of

* Professor of Political Science and International Affairs, The George Washington University; Ph.D. (1977), University of Virginia; M.A. (1973), M.A. (1972), B.A. (1970), Florida State University.

** M.A. (1992), Elliott School of International Affairs, The George Washington University; B.A. (1990), State University of New York at Binghamton.

31,000 feet, the *Maid of the Seas* made its last contact with ground control. Seven minutes later, the green cross-hair at air traffic control split into five bright blips as Pan Am Flight 103 exploded in midair. Her fiery skeleton, laden with the bodies of passengers and crew, rained down on the people of Lockerbie, Scotland. Within the hour, 243 passengers, 16 crew members, and 11 townspeople were dead.[1]

Nearly three years later, following extensive international investigations, the United States indicted two Libyan intelligence officers in November 1991 for the bombing of Pan Am Flight 103.[2] The Libyan response to informal extradition claims was not unexpected: the government refused to surrender the officers on the grounds that such an act constituted direct interference in Libya's internal affairs.[3]

In January 1992, and again in March 1992, the United Nations Security Council responded to the Libyan position with two resolutions: the first urged the government of Colonel Muammar el-Qadhafi to cooperate with the international investigation of the bombing;[4] the second imposed sanctions on Libya for its failure to comply with the Security Council's requests.[5] Taken together as legal prescriptions, the Security Council's actions marked the first time that the United Nations had ever demanded extradition of nationals of one State to face trial in a second State, despite the existence of international legal principles supporting Libya's position to refuse extradition of its nationals.[6]

The U.N. Security Council resolutions in the Lockerbie case represent a salient, albeit as yet unconsummated, step toward strengthening the international extradition process for dealing with alleged terrorist acts. In the past, international fugitives who committed unlawful acts abroad often found sanctuary behind the political veils of customary and codified law, evading extradition with the shield of State sovereignty. The lack of a universally accepted rule of law has left extradition to bilateral treaties and acts of reciprocity and comity, which provide only malleable standards that States can interpret and reinter-

1. These facts are drawn from STEVEN EMERSON & BRIAN DUFFY, THE FALL OF PAN AM 103: INSIDE THE LOCKERBIE INVESTIGATION 11-31 (1990).

2. Indictment, United States v. Abdel Basset Ali al-Megrahi, __ F. Supp. __ (D.D.C. 19__) (No. CR-91-645) (filed Nov. 14, 1991), *reprinted as annex in* U.N. Doc. A/46/831 (1991), U.N. Doc. S/23317 (1991) [hereinafter U.S. Indictment].

3. Paul Lewis, *Libya Unyielding Despite U.N. Demand*, N.Y. TIMES, Jan. 22, 1992, at A8.

4. S.C. Res. 731, U.N. SCOR, 3033rd mtg., U.N. Doc. S/23574 (1992), *reprinted in* 31 I.L.M. 731-33 (1992). The Security Council unanimously passed Resolution 731. *Id* at 731.

5. S.C. Res. 748, U.N. SCOR, 3063d mtg., U.N. Doc. S/RES/748 (1992), *reprinted in* 31 I.L.M. 749 (1992). The Security Council adopted Resolution 748 by a 10 to 0 vote, with 5 abstentions. *Id.* at 749.

6. *See* Lewis, *Libya Unyielding Despite U.N. Demand*, *supra* note 3, at A8.

pret to suit their needs. The subjective nature of "relative" political acts, coupled with differing State penal laws and judicial systems, has further hampered the process of transnational extradition.

The Security Council's concerted action to compel legal cooperation from Libya provokes inquiry into whether supreme authority over extradition in the international community may be shifting slowly away from State sovereignty and toward the collective will of the United Nations. Although the full impact of the council resolutions is not yet known, such collective action is appropriate for particularly notorious cases, such as the Lockerbie bombing, fraught with myriad political complications.

This study examines the shortcomings of the international extradition process in bringing terrorists to justice. Specifically, the Lockerbie incident provides a means both for highlighting customary norms within the international extradition process and analyzing the legal implications of Security Council resolutions—for Libya in particular, but also for international law in general. Does concerted action taken by the U.N. Security Council against Libya bolster the international extradition process? Or do these resolutions represent little more than a new coat of legal paint on the same old political problems?

This article seeks to answer these questions through an analysis of the nature of terrorism, the customary bases for jurisdiction and extradition, and the validity of Libya's refusal to surrender the Lockerbie suspects. Part I discusses the events surrounding the bombing of Pan Am Flight 103 and the subsequent indictment of the Libyan nationals. Part II briefly examines the general nature of terrorism and the international extradition process. This treatment provides an analytical framework for assessing the Libyan government's actions. Part III examines in detail the bases for lawful jurisdiction warranting extradition as specifically applied to the bombing of Pan Am Flight 103. Part IV outlines the current international extradition framework and discusses the legal and political obstacles inhibiting extradition of Libyan nationals in this case. Part V weighs Libya's capacity to refuse the United States' and United Kingdom's informal extradition request against customary norms of international extradition law. Finally, Part VI discusses the special legal implications of the Security Council resolutions and offers some conclusions concerning the relevance of the 1992 Libyan case for the international extradition process in general.

I. THE BOMBING OVER LOCKERBIE: EVIDENCE FOR THE INDICTMENTS

The 193-count indictment[7] accusing Lamen Khalifa Fhimah and Abdel Basset Ali al-Megrahi with planning and carrying out the Lockerbie bombing[8] represented the most extensive investigation ever conducted for an act of terrorism. Handed down on November 14, 1991, the indictment supplied the final piece of a multinational jigsaw puzzle that took three years to complete.

Between January 1989 and November 1991, a joint U.S.-Scottish team tracked down leads in fifty countries, questioned 14,000 people, and combed some 845 square miles around Lockerbie.[9] The fruits of their search: a shard of circuit board smaller than a fingernail, a fragment of an explosive timer embedded in an article of clothing, and a few entries in a private diary. These three pieces of physical evidence led investigators to two Libyan nationals, Abdel Basset Ali al-Megrahi and Lamen Khalifa Fhimah.

In 1990, a CIA official linked the bombing of Pan Am Flight 103 to Iran.[10] This plausible conclusion suggested that the Syrian-based Popular Front for the Liberation of Palestine-General Command (PFLP-GC) had been hired at the behest of Ayatollah Khomeini of Iran.[11] In late October 1988, however, the German federal police, in Operation Autumn Leaves, broke up a PFLP-GC cell operating in Neuss, Germany. These arrests forced the conspirators to shift their strategy. The Tripoli government finished the job.[12]

Libyan involvement was apparently confirmed[13] with a forensic

7. The two men are charged with 189 counts of murdering U.S. nationals, one count of conspiracy, and three additional counts of putting a destructive device on a U.S. civil aircraft resulting in death, destroying a U.S. civil aircraft with an explosive device, and destroying a vehicle in foreign commerce. The last three charges carry the death penalty. *See* U.S. Indictment, *supra* note 2; George Lardner, *2 Libyans Indicted in Pan Am Blast*, WASH. POST, Nov. 15, 1991, at A1.

8. U.S. Indictment, *supra* note 2, at para. 38.

9. Discovery of evidence in this world-wide detective effort ranged from forensic experts examining hundreds of thousands of debris fragments gathered from the Scottish countryside to intelligence agents stealing a personal diary in the back streets of Malta. *See* David Johnston, *Flight 103: A Solution Assembled From Fragments and Debris*, N.Y. TIMES, Nov. 15, 1991, at A8.

10. Stewart Tendler, *How Technical Experts Cracked Pan Am Mystery*, THE TIMES (London), Nov. 15, 1991, at 2.

11. Lardner, *supra* note 7, at A1. Iran's purported motivation for the bombing may have been revenge for the mistaken downing of an Iranian air bus over the Persian Gulf by the *USS Vincennes* in July 1988.

12. Libya had motives similar to Iran's for executing the bombing: revenge for the United States' attack in April 1986 on Tripoli and Benghazi. Andrew Rosenthal, *U.S. Accuses Libya as 2 Are Charged in Pan Am Bombing*, N.Y. TIMES, Nov. 15, 1991, at A1.

13. Prosecutors have stated that their three-year investigation produced no evidence of Ira-

scientist's discovery of a tiny microchip of the bomb's trigger mechanism. This "technical fingerprint" was embedded in a shirt that had come from the suitcase containing the bomb.[14] Intense searching through CIA files turned up a connection with the 1984 bombing of a French aircraft in Chad. The re-examination of a 1984 incident in Togo[15] and the bombing on September 19, 1989, of a UTA flight over Niger provided additional evidence.[16] The most significant link, however, came from two Libyan intelligence agents arrested in Senegal in 1988.[17] At the time of their arrest, they were discovered carrying Semtex and several triggering devices. Analysis of photographs of the Senegal and Togo timers led investigators to conclude that the devices matched the Pan Am Flight 103 and UTA bomb fragments.[18]

The connecting link between the Lockerbie timer and the two Libyan suspects came from Fhimah's own notebook.[19] U.S. prosecutors contend that on December 7, 1988, al-Megrahi flew from Libya to Malta and checked in at the Holiday Inn at Sliema.[20] He registered himself as a "flight dispatcher" for Libyan Arab Airlines.[21] At a nearby shop, Mary's House, he purchased an umbrella and some clothes for the bomb's travel bag.[22] Both men then traveled to Tripoli for meetings and returned to Malta on December 20, 1988, to build

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nian or Syrian involvement in the bombing. They emphasized that although these nations were prime suspects in the early stages of the investigation, the evidence ultimately implicated the Libyans. Johnston, *supra* note 9, at A8. *See also* Michael Wines, *It Was Libya, U.S. Insists; Syria? Iran? Probably Not*, N.Y. TIMES, Apr. 1, 1992, at A12.

14. Johnston, *supra* note 9, at A8.

15. A complete digital timer matching the Lockerbie fragment was confiscated through a botched attack on the U.S. embassy in Togo. *Id.*

16. According to published reports, the French have recovered a timer fragment from the UTA wreckage that is identical to the Lockerbie chip. *See Who Paid for the Bullet?*, NEWSWEEK, Nov. 25, 1991, at 28.

17. Tendler, *supra* note 10, at 2.

18. Lardner, *supra* note 7, at A1. Further analysis traced the timers to a Swiss telecommunications company, Meister & Bollier (MEBO). According to U.S. Assistant Attorney General Robert Mueller, the three circuits were part of a limited series of MST-13 digital electric timers that MEBO manufactured in 1985-86. The United States contends these prototypes were ordered to specification by Libya's then-acting Minister of Justice, Izzel Din al Hinshiri, and were delivered directly to the Jamahiriya Security Organization (JSO), the Libyan secret service. *See* George Graham, *Largest Ever Terrorist Investigation*, FIN. TIMES, Nov. 15, 1991, at 9, col. 2; Johnston, *supra* note 9, at A8.

19. Although prosecutors would not comment on how they received this diary, they claim numerous entries directly implicate both men. It is alleged that al-Megrahi, who was then chief of the Libyan JSO's airline security section, received one of these timers and gave it to Fhimah, who was station manager for Libyan Arab Airlines at Luqa airport, Malta. Johnston, *supra* note 9, at A8. *See also* Graham, *supra* note 18, at 9.

20. U.S. Indictment, *supra* note 2, at para. 39 (c), (d), and (e). *See also* Martin Fletcher, *Investigators Jubilant at Finest Hour*, THE TIMES (London), Nov. 15, 1991, at 2.

21. U.S. Indictment, *supra* note 2, at para. 39 (d). *See also* Graham, *supra* note 18, at 9.

22. U.S. Indictment, *supra* note 2, at para. 39 (e). *See also* Lardner, *supra* note 7, at A20.

the bomb.[23] The next day, using stolen Air Malta baggage tags marked "Rush JFK," the two allegedly introduced the suitcase rigged with explosives into Luqa Airport's interairline baggage system as unaccompanied luggage on Air Malta Flight KM-180.[24] This flight connected to Pan Am Flight 103 via Frankfurt, Germany. Thirty-eight minutes after Pan Am Flight 103's take-off, the bomb detonated.

Nearly three years later, the cumulative evidence led to the indictment of the two Libyan intelligence officers by a federal grand jury in Washington, D.C.[25] Although neither formal diplomatic relations nor a bilateral extradition treaty existed between the United States and Libya, informal extradition claims were forwarded through the Belgian Embassy to Tripoli.[26] Libya's response was not unexpected; the Qadhafi government refused to grant extradition, asserting such an act constituted direct interference in Libya's internal affairs.[27]

On January 21, 1992, the U.N. Security Council adopted Resolution 731.[28] This resolution "strongly deplore[d]" Libya's lack of cooperation in the Pan Am Flight 103 matter and urged the Libyan government to respond to the requests by the United Kingdom, the United States, and France. In particular, Resolution 731 urged the Libyan government to immediately "provide a full and effective response to those requests so as to contribute to the elimination of international terrorism[.]"[29] In essence, this Security Council action urged Libya to surrender its nationals to stand trial for the 1988 bombing of Pan Am Flight 103 and to cooperate in the investigation of the 1989 bombing of UTA Flight 772.[30] In its formal response to Security Council Resolution 731, the Libyan government asserted that Libyan law did not permit the extradition of Libyan nationals. Extradition of

23. U.S. Indictment, *supra* note 2, at para. 39 (l), (m), (n), and (o). *See also* Graham, *supra* note 18, at 9.

24. U.S. Indictment, *supra* note 2, at para. 39 (s); Martin Fletcher & Kerry Gill, *Libya Told: Surrender Lockerbie Suspects*, THE TIMES (London), Nov. 15, 1991, at 1.

25. *Id. See also* Lardner, *supra* note 7, at A1.

26. *See* Statement Issued by the Government of the United States on 27 November 1991 Regarding the Bombing of Pan Am 103, U.N. Doc. S/23308 (1991), *reprinted in* 31 I.L.M. 723 (1992). The British government issued a similar statement on November 27, 1991. *See* U.N. Doc. S/23307 (Dec. 20, 1991), *reprinted in* 31 I.L.M. 722. The U.S. extradition request demanded Libya surrender the two suspects to the United States for prosecution. Because the United States does not have diplomatic relations with Libya this request was delivered through the protective powers of Belgium. Telephone interview with Robert Kushen, Office of Legal Advisor (Law Enforcement and Intelligence), U.S. Department of State (Apr. 27, 1992).

27. Lewis, *Libya Unyielding Despite U.N. Demand*, *supra* note 3, at A8.

28. S.C. Res. 731, U.N. SCOR, 3033d mtg., U.N. Doc. S/23574 (1992), *reprinted in* 31 I.L.M. 731-33 (1992).

29. *Id.* para. 3.

30. *Text of U.N. Resolution Asking Libya's Help*, N.Y. TIMES, Jan. 22, 1992, at A8.

the two suspects, it argued, would "violate the rights of [Libyan] citizens protected by law."[31]

Libya's failure to abide by this binding order prompted the March 31, 1992, adoption of another Security Council measure, Resolution 748 (1992).[32] This second resolution called for the imposition of international sanctions against Libya, including severance of arms sales and air links, and the reduction of diplomatic staff at all Libyan embassies.[33] Security Council resolutions 731 and 748 marked the first time the United Nations ever ordered a State to surrender its nationals to face trial in another country with the threat of universal sanctions for failing to comply with the order.[34]

II. THE NATURE OF TERRORISM

Public opinion commonly assumes international terrorism to be the work of irrational extremists bent on indiscriminate murder. Terrorism, however, is less the work of "madmen" than it is a systematic tactic used to attain political or strategic ends.[35] Terrorism involves calculated political strategies of fear, coercion, and warfare. More recently, terrorism arguably has become a convenient instrument of foreign policy.[36]

"Terrorism" defies precise definition. Because of its highly subjective and politicized nature, the precise definition for terrorism under international law remains elusive.[37] In a real sense, the difficulties involved in defining terrorism recall Justice Stewart's reflection on the intricacies of defining obscenity:[38] we know it when we see it, but there exists no universally accepted definition. As a result, terrorism remains easier to describe and identify than to define in exact legal language acceptable to most governments.

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31. Letter from the Secretary of the People's Committee for Foreign Liaison and International Cooperation of the Libyan Arab Jamahiriya addressed to the Secretary-General, (delivered March 2, 1992), *reprinted in* 31 I.L.M. 739-40, at 740 (1992).

32. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. U.N. Doc. S/RES/748 (1992), *reprinted in* 31 I.L.M. 749 (1992).

33. *Id.* at paras. 4, 5 and 6. *See also* Paul Lewis, *Security Council Votes to Prohibit Arms Exports and Flights to Libya*, N.Y. TIMES, Apr. 1, 1992, at A1, A12.

34. Lewis, *Libya Unyielding Despite U.N. Demand*, *supra* note 3, at A8.

35. *See* PAUL WILKINSON, TERRORISM AND THE LIBERAL STATE 51 (2d ed. 1986).

36. Christopher C. Joyner & Erik W. Lenz, *Terrorism and the United Nations: Political Challenges and Legal Responses*, 35 Current World Leaders 333-34 (1992).

37. *See e.g.*, Geoffrey Levitt, *Is Terrorism Worth Defining?*, 13 OHIO N.U. L. REV. 97 (1986) (analyzing domestic and international efforts to define terrorism in a legally operative context).

38. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("...I know it when I see it.").

In many instances, terrorism has proven effective as a deadly magnet for attracting media attention and achieving limited aims such as intimidation and extortion.[39] As an international phenomenon, however, resort to terrorist means is not homologous. Different groups pursue different ends through different means with different intensities.[40]

State-sponsored terrorism has emerged since the 1970s as a dangerous strain of international violence.[41] State sponsorship is distinguished from other categories of terrorism by the premeditated use of State agents for clandestine international activity that has been instigated, supported, or authorized by a legitimate national government.[42] The benefits accrued from this strategy are twofold. First, the sponsoring government is able to encourage and effectively pursue an internationally unlawful policy of its own choosing, while maintaining a cover of plausible denial.[43] Second, State sponsorship represents a low-cost, convenient means of eliminating exiled dissidents, coercing and intimidating adversarial governments, destabilizing and embarrassing antagonist leaders, and exporting revolutionary ideology.[44] Not surprisingly, as an extended weapon of the State, terrorism has evolved into a pernicious, furtive tactic aimed at committing highly sophisticated mayhem, murder, and destruction of innocent people. Many sponsoring States view terrorist tactics as an effective means of overcoming threats to their national autonomy.[45] As a consequence, some governments have refused to condemn State-sponsored terrorism when avowedly used as a tool against imperialism.[46] This policy atti-

39. *See generally* TERRORISM, THE MEDIA AND THE LAW (A. Miller ed. 1982) (discussing the conflicting relationship between terrorists, journalists, and law enforcement).

40. *See generally* U.S. GOVERNMENT, TERRORIST GROUP PROFILES (Nov. 1988) (providing overviews of the political objectives, target audiences, and sponsors of various terrorist groups).

41. Paul Wilkinson has suggested that 25% of contemporary terrorist incidents are either state-sponsored or state-directed. WILKINSON, *supra* note 35, at 275.

42. STATE SPONSORED TERRORISM, REPORT PREPARED FOR THE SUBCOMM. ON SECURITY AND TERRORISM, FOR THE USE OF THE COMM. ON THE JUDICIARY, 99th Cong., 1st sess., at 58 (June 1985).

43. The use of State-sponsored terrorism is set apart from more conventional forms of coercive force at a State's disposal by the option of plausible denial, or lack of public accountability. *Id.*

44. States use primarily two methods for exporting State-sponsored terrorism: (1) direct control of "hit squads" made up of intelligence officers and covert nationals engaging in bombings, assassinations, and other clandestine activities; and (2) the sponsoring of surrogate organizations. WILKINSON, *supra* note 35, at 275-76.

45. Yvonne G. Grassie, Note, *Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?*, 64 WASH. U. L.Q. 1205, 1209 (1989).

46. *See* ROBERT A. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 87 (1984).

tude has been a primary barrier precluding agreement over a universally accepted legal definition of terrorism.

Under international law, responsibility lies with the State to ensure that its citizens do not harm foreign nationals or other States. If a government learns of the intent to commit a wrong or instigates the act itself, the State is culpable. States, however, are neither responsible nor liable for each and every act conducted by their nationals. Even so, when a State discovers its territory has become a springboard for hostile acts against another State, international law requires it to take preventive measures.[47] This duty of customary law is clearly established through international arbitral decisions,[48] and was articulated in 1970 by the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.[49]

These legal obligations notwithstanding, Libya has become recognized as a sponsor of transnational terrorism.[50] The long history of

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47. See Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 257 (1977); D. Cameron Findlay, *Abducting Terrorist Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L. L.J. 1, 22-23 (1988).

48. In *Alabama Claims*, an arbitration tribunal found that the British government could be held responsible for acts committed against the Union forces during the U.S. Civil War because it violated neutrality principles when it sold a warship to the Confederate Army. Alabama Claims, *reported in*, JOHN B. MOORE, VII A DIGEST OF INTERNATIONAL LAW 1059-61 (1906). Likewise, in *Texas Cattle Claims*, an international arbitrator found that Mexico could be held liable for injuries and damage inflicted by armed bands in cross-border raids into the United States. The court based its decision on the fact that Mexico had permitted its territory to be used as a safe haven, and for seven years had not apprehended or prosecuted the bandits. Texas Cattle Claims, American-Mexican Claims Commission, Gen. Mem. Op. (Dec. 30, 1944), *cited in*, MARJORIE WHITEMAN, 8 DIGEST OF INTERNATIONAL LAW 749-56 (1967). More recently, in the *Island of Palmas*, Arbitrator Max Huber held:

> Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary duty: the obligation to protect within [its] territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.

Island of Palmas (U.S. v. Neth.) 2 R.I.A.A. 829 (1928).

49. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28 at 121, U.N. Doc. A/2028, *reprinted in* 65 AM. J. INT'L L. 243, 246 (1971). The declaration provided that every state has a duty

> to refrain from organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another state and to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts[.]

Id. at 246.

50. Tripoli has been accused of operating "numerous training sites for foreign dissident groups that provide instruction in the use of explosive devices, hijacking, assassination, and various commando and guerilla techniques," and providing "safe haven, money and arms to groups such as the Popular Front for the Liberation of Palestine-General Command (PFLP-GC), the Fatah dissidents led by Abu Masa, and the notorious Abu Nidal Group." U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 4-5 (1985).

Tripoli's involvement is well documented,[51] and Colonel Muammar el-Qadhafi stands accused of using terrorism as a principal weapon of Libyan foreign policy.[52] Given Libya's known terrorist track record, it came as little surprise that the Pan Am bombing was informally linked to the Tripoli government.[53] Consequently, Libya's past behavior and its often skewed perversions of international law arguably have done much to undercut its claim of innocence and little to insulate the Qadhafi regime from culpability.

The politically sensitive, subjective nature of what constitutes "terrorism" and how terrorists should be punished has fostered reluctance among certain States to harmonize their criminal codes on such unlawful activities. Municipal laws tend to focus on the intentions and targets of terrorists. Hence, unlawful activity in one State may be considered legal in another. This conundrum has prevented governments from asserting jurisdiction over terrorist acts.[54] The consequence has been a failure to prosecute.

Between 1970 and 1975, at least 267 suspected terrorists were apprehended. Of these, fifty were convicted and served sentences, thirty-nine were freed without punishment, fifty-eight were given safe conduct to another country, and sixteen were released following demands by other terrorists.[55] None, however, were extradited. Similarly, of the 150 accused Palestinian terrorists captured between 1971 and

51. Since 1976, Libyan agents have killed or kidnapped Libyan émigrés all over the world. WALTER LAQUEUR, THE AGE OF TERRORISM 282 (1987). *See also*, U.S. DEP'T OF STATE, REPORT ON LIBYA, *reported in*, M. Boyd, *President Freezes All Libyan Assets Held in the U.S.*, N.Y. TIMES, Jan. 9, 1986, at A1.

52. Qadhafi firmly believes that under his global mission of Arab unity, he has the right to interfere in the affairs of every foreign country. The Qadhafi regime has gone so far as to publicly advertise in foreign newspapers to enlist mercenaries. The terms of employment are suicide missions abroad. LAQUEUR, *supra* note 51, at 282-84.

53. State Department Spokesman Richard Boucher went so far as to implicate Libya's inner circle in the bombing. *See* Lardner, *supra* note 7, at A20. British Foreign Secretary Douglas Hurd boldly asserted, "[T]his is mass murder which is alleged to involve the organs of government of a state." Fletcher & Gill, *supra* note 24, at 1.

54. In *Tel-Oren v. Libyan Arab Republic*, judges on the Court of Appeals for the District of Columbia wrote separate concurring opinions refusing to extend jurisdiction over defendants being sued for certain acts of terrorism committed abroad. In the view of Judge Edwards, "I cannot conclude that the law of nations . . . outlaws politically motivated terrorism, no matter how repugnant it might be to our legal system." Tel-Oren v. Libyan Arab Republic, 726 F.2d. 774, 796 (D.C. Cir. 1984) (Edwards, J. concurring), *cert. denied*, 470 U.S. 1031 (1985). In concluding the case was a nonjusticiable political question, Judge Robb declared, "[f]ederal courts are not in a position to determine the international status of terrorist acts." *Id.* at 823 (Robb, J. concurring in the result). Although *Tel-Oren* involved a civil suit and not a criminal prosecution, the Court did address the implications of prosecuting terrorists in U.S. courts.

55. *See* Nicholas N. Kittrie, *Reconciling the Irreconcilable: The Quest for International Agreement over Political Crime and Terrorism*, 1978 Y.B. WORLD AFF. 208, 232, *citing* U.S. NEWS & WORLD REP., Sept. 29, 1975, at 79. The fate of 104 terrorist suspects had not been determined at the time of Kittrie's study.

1976, 141 were released without punishment.[56] Furthermore, of the 353 airplane hijackers apprehended between 1977 to 1982, only one was extradited.[57]

Extradition procedures provide a necessary channel for bringing accused terrorists to justice. A criminal who succeeds in placing himself outside the territory of the State in which he has committed a crime also places himself beyond the reach of the law that he has violated. Through the formal process of extradition, one government turns over the accused individual to the custody of another government by virtue of a treaty, reciprocity, or comity.[58] Nearly four centuries ago, Hugo Grotius contended it was a State's duty either to extradite or prosecute criminals found within its territories after a second State requested extradition.[59]

Under contemporary international law, however, no universal rule obligates States to extradite, or even prosecute, alleged criminals who hide in their territory.[60] Indeed, the international extradition process today operates almost entirely through bilateral treaties and a few multilateral conventions that prescribe the methods for requesting and surrendering suspects. As such, the international extradition system has provided only a marginal impact on bringing international terrorists to justice. Thus, although governments agree that terrorism remains an offense against the international community,[61] multinational enforcement is lacking.

III. JURISDICTION: CUSTOMARY NORMS AND THE LOCKERBIE INCIDENT

A State must first have jurisdiction over the act of terrorism before it can begin procedures to extradite those accused of the crimes. In such cases, jurisdiction is tempered by domestic law, international cus-

56. *See* Andrew J. Pierre, *The Politics of International Terrorism*, 19 ORBIS 1251, 1264 (1976).

57. *See* JOHN F. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 113 (1985).

58. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5-33 (1987).

59. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, bk. 2, ch. 21, §§ 3-4 (James B. Scott ed. 1925).

60. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 401 cmt. b (1987) [hereinafter THIRD RESTATEMENT].

Indeed, as Judges Evensen, Tarassov, Guillaume, and Aguilar Mawdsley recently stated in their joint declaration in the Libyan case concerning the Lockerbie incident: "In so far as general international law is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out. Moreover, in general international law, there is no obligation to prosecute in default of extradition." Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, 1992 I.C.J. 136, *reprinted in*, 31 I.L.M. 676 (1992).

61. Joyner & Lenz, *supra* note 36, at 335.

tomary standards, and any applicable treaties. Each area is relevant to the United States' requests for surrender of the Libyan nationals.

A. *Jurisdiction Under Domestic Law*

In the United States, federal courts have customarily limited the extraterritorial application of criminal laws absent express congressional intent to do otherwise.[62] Federal laws tend to apply only within U.S. territories and to U.S. nationals abroad.[63] Congress, however, still retains power to extend U.S. laws extraterritorially through the Offense Clause of the U.S. Constitution, which grants lawmakers the authority to define and punish transnational offenses.[64] More recent interpretations have expanded this power to include criminal behavior defined simply by congressional perceptions of international norms.[65] Nevertheless, extraterritorial laws must be grounded in accepted jurisdictional principles that are recognized and upheld by domestic courts, as well as accepted under international law.[66]

In 1984, Congress passed the Comprehensive Crime Control Act,[67] a collection of antiterrorist legislation designed to close loopholes in U.S. law through which terrorists might slip.[68] This broad piece of legislation specifically grants U.S. courts extraterritorial jurisdiction over the crimes of hostage taking[69] and aircraft sabotage.[70]

The Aircraft Sabotage Act,[71] the first statute in the crime control

62. G. Gregory Schuetz, *Apprehending Terrorist Overseas Under United States and International Law: A Case Study of the Fawaz Younis Arrest*, 29 HARV. INT'L L. J. 499, 506 (1988).

63. *See* Blackmer v. United States, 284 U.S. 421, 437 (1932); THIRD RESTATEMENT, *supra* note 60, § 402.

64. The U.S. Constitution gives Congress the authority to "define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

65. *See generally* Schuetz, *supra* note 62 (discussing the potential political ramifications of apprehending suspected terrorists abroad for trial in the United States).

66. Catherine C. Fisher, *U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?*, 18 VAND. J. TRANSNAT'L L. 915, 924 (1985).

67. Pub. L. No. 98-473, ch. 20, 98 Stat. 2186-90 (1984) (codified at 18 U.S.C. §§ 31-32, 1203 (1982 & Supp. III 1985)).

68. U.S. Sen. Arlen Specter, R-Pa., was astounded when he learned that the terrorist bombing of the Marine barracks in Lebanon that killed over 260 Americans was not illegal under U.S. law. In supporting the adoption of the Terrorist Protection Act he argued: "[T]here has been a great deal of tough talk about terrorism, but very little tough action. The enactment of this measure will enable the United States to supplement the tough talk with some tough action." S. 1429, 99th Cong., 2nd sess., 132 CONG. REC. S2357 (1986). *See also* Terrorist Prosecution Act, S. 1429, 99th Cong., 1st Sess., 131 CONG. REC. S18870-71 (1985).

69. Act for the Prevention and Punishment of the Crime of Hostage Taking, Pub. L. No. 98-473, Tit. II, §§ 2001-2003, 98 Stat. 2186 (1984) (codified at 18 U.S.C. § 1203 (1982 & Supp. III 1985)).

70. 18 U.S.C. §§ 31-32 (1982 & Supp. III 1985).

71. 18 U.S.C. §§ 31-32 (1982 & Supp. III 1985). For the legislative history of the Aircraft

act, ratified the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention).[72] By expanding protection to aircraft and air navigational facilities, the Aircraft Sabotage Act establishes a domestic basis for extraterritorial jurisdiction over certain aircraft-related offenses. Specifically, section 32 of Title 18 of the United States Code was amended to comply with international obligations under the Montreal Convention, which states:

> Whoever willfully sets fire to, damages, destroys, disables, or interferes with the operation of or makes unsuitable for use any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce; or
>
> Whoever willfully places or causes to be placed a destructive device or substance in, upon, or in proximity to, or otherwise makes or causes to be made unworkable or unusable or hazardous to work or use, any such aircraft, or any part or other materials used or intended to be used in connection with the operation of such aircraft; . . . shall be fined not more than $100,000 or imprisoned not more than twenty years or both.[73]

The Aircraft Sabotage Act clearly extends U.S. national jurisdiction over American aircraft flying outside of U.S. territory, including Pan Am Flight 103. Indeed, this plain and unambiguous language illustrates the obvious intent of Congress to realign U.S. federal law to meet a binding international standard. Most importantly, this prescription provides U.S. courts with a constitutional base for extending U.S. jurisdiction to non-nationals living abroad.[74]

B. *Jurisdiction Under International Law*

International law limits a State's jurisdiction to apply its statutes extraterritorially.[75] Traditionally, a State may not prosecute a criminal seized beyond its borders unless it has lawful jurisdiction over the committed act. In effect, the jurisdiction to prescribe must exist before the jurisdiction to adjudicate and enforce.[76] Extraterritorial jurisdic-

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Sabotage Act, see S. REP. No. 619, 98th Cong., 2d. Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3682-89.

72. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter Montreal Convention].

73. 18 U.S.C. § 32 (Supp. III 1985).

74. *See generally* United States v. Bowman, 260 U.S. 94 (1922) (holding that Congress may extend United States law extraterritorially when it evinces a clear intent to do so).

75. *See* THIRD RESTATEMENT, *supra* note 60, §§ 401-03.

76. Prescriptive jurisdiction entails the authority to legislate and to apply a State's substantive laws in an international context. In *Rivard v. United States*, the court noted the general principle that "[u]nder international law a state does not have jurisdiction to enforce a rule of law

tion, therefore, involves a two-step process. First, it must be determined whether the State's domestic law covers the offensive act. In the Lockerbie case, the U.S. Aircraft Sabotage Act provides grounds for jurisdiction.

Second, it must be ascertained whether a sovereign State may proscribe such conduct extraterritorially under international law.[77] Under this second criterion, the U.S. government can apply any of international law's five theoretical constructs for exercising prescriptive jurisdiction:[78] (1) the territorial principle;[79] (2) the nationality principle;[80] (3) the protective principle;[81] (4) the passive personality

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prescribed by it, unless it had jurisdiction to prescribe the rule." Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967).

77. The First Circuit Court of Appeals put it well when it posited that "a state does not have jurisdiction to enforce a rule enacted by it unless it had jurisdiction to prescribe the conduct in question." United States v. Smith, 680 F.2d 255, 257 (1st Cir. 1982) (*quoting* Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967)).

78. These precepts are discussed in Edwin D. Dickinson et al., *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435, 484-508 (Supp. 1935).

79. The territorial principle determines jurisdiction according to location of the crime, and holds that a State may punish crimes committed within its territory. Of all jurisdictional principles for extradition, the territorial principle remains most universally accepted. Dickinson et al., *supra* note 78, at 484-508; Christopher L. Blakesley, *United States Extradition Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1118-19, 1123 (1982).

Territoriality has been further divided into two categories: subjective and objective territoriality. The notion of subjective territorial jurisdiction is used to justify legislation punishing criminal conduct that commences within a State and is completed abroad. Under this principle, a State retains the right to punish the perpetrator of a crime that is carried out elsewhere when the intent to commit that crime was formulated within that State. The subjective variety, then, would extend jurisdiction over offenses committed outside a State's borders, so long as an essential element of the crime must have occurred within that State itself. *See, e.g.*, People v. Botkin, 132 Cal. 231, 64 P. 286 (1901) (granting jurisdiction over a California defendant who mailed poisonous candy to a Delaware recipient who died after eating the candy).

Objective territoriality covers offenses that began outside a State's territory but were completed within. Also known as the "effects doctrine," objective territorial jurisdiction may be justified when certain crimes generate serious consequences or "effects" within the State. *See, e.g.*, S.S. Lotus (France v. Turkey), P.C.I.J., Ser. A, No. 10 (1927) (characterizing the death of Turkish nationals on the high seas as having repercussions within Turkey); *see also* United States v. King, 552 F.2d 833, 851-52 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (prosecuting a defendant for unlawful distribution of heroin in Japan that was intended for importation into the United States).

80. The nationality principle, which is universally accepted, allows a State to prescribe laws that bind its nationals, regardless the location of either the national or the offense. The nationality principle effectively extends a State's jurisdiction to actions taken by its citizens outside its territorial boundaries. The State not only is expected to protect its citizens when they are abroad, but it may also punish its citizens' criminal conduct, regardless of where it occurred. As the U.S. Supreme Court noted in *Blackmer v. United States*: "Jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and to obey them." Blackmer v. United States, 284 U.S. 421, 438 (1932).

81. The protective principle concerns acts abroad that are considered prejudicial to the State's security interests. Under the protective principle, a State may exercise jurisdiction over certain acts that take place outside its territory, when such acts threaten the security, territorial integrity, or political independence of the State. Moreover, the protective principle permits States to prosecute nationals of other States for their conduct outside the offended state. *See, e.g.*,

principle;[82] and (5) the universality principle.[83] Variants of four of these theories, specifically, "floating" territoriality, the protective principle, the universality principle, and passive personality, apply in the Lockerbie case.

The theory of "floating" territoriality recognizes United States' jurisdiction for terrorist acts committed aboard its flag vessels and aircraft.[84] This notion assumes that all flag-bearing air and sea vessels are detached pieces of a State's territory. Any harm to its vessel constitutes an offense against the State itself; thus, criminal liability attaches. Since Pan Am Flight 103 was a U.S.-flagged aircraft and its destruction resulted in injury to the United States, extraterritorial jurisdiction may lawfully be extended to apprehend the perpetrators.

The protective principle justifies a State's right to punish offenders for crimes deemed harmful to the security or vital interests of the State.[85] Upholding this claim, French, Israeli, and several Latin

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United States v. Pizzarusso, 338 F.2d 8 (2d Cir. 1968) (holding that false statements on an immigration visa before a U.S. consul in Canada had a sufficiently adverse impact on U.S. interests to warrant exercising jurisdiction over the defendant).

82. The passive personality principle gives a State extraterritorial jurisdiction over offenses committed against its nationals, wherever the crime takes place. Jurisdiction is based on the nationality of the crime victim. The passive personality principle has not been widely used, largely because it is controversial and often conflicts with the territorial principle. Passive personality implies that people carry the protection of their State's law with them beyond its territorial jurisdiction. This assertion challenges the fundamental premise of a State's sovereign jurisdiction over its own territory, which obviously undercuts the fundamental principle of territorial sovereignty. *See, e.g.*, United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984) (convicting a foreign defendant in a U.S. court for conspiracy to murder, assault, and rob U.S. Drug Enforcement Agents in Colombia); *see also* United States v. Marino-Garcia, 679 F.2d. 1373, 1381 (11th Cir. 1972) (invoking passive personality to allow jurisdiction over persons or vessels that injure the citizens of another country).

83. The principle of universal jurisdiction recognizes that certain acts are so heinous and widely condemned that any State may prosecute an offender once custody is obtained. Such crimes—piracy, slave trading, harming diplomats, hijacking aircraft, war crimes, and genocide—are of universal interest to States and their perpetrators are considered to be the enemies of all humanity. A person accused of such crime can be arrested and tried by any State without concern for the nationality of the accused and without establishing any link between the criminal and the prosecuting State; all that is required is universal condemnation of the crime.

According to the THIRD RESTATEMENT:

> A State may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, *attacks on or hijacking of aircraft*, genocide, war crimes, and perhaps terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

THIRD RESTATEMENT, *supra* note 60, § 404 (emphasis added).

84. THIRD RESTATEMENT, *supra* note 60, § 402 (1) (c). Article 3 of the 1963 Tokyo Convention reaffirms the "law of the flag principle" and assigns the State of registration competence to exercise jurisdiction over offenses and acts committed on board its aircraft. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, art. 3, 20 U.S.T. 2941, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969) [hereinafter Tokyo Convention]. *See also* BASSIOUNI, *supra* note 58, at 261-82. For maritime vessels, see Ved P. Nanda, *Enforcement of U.S. Laws at Sea*, *in* INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 155-65 (Richard B. Lillich ed. 1981).

85. THIRD RESTATEMENT, *supra* note 60, § 402 (3), cmt. f.

American courts have extended this protective theory to incidents involving terrorist acts.[86] Some publicists contend this view should encompass terrorist acts against the United States.[87] Since many of these attacks are intended to sway U.S. foreign policy, vital American interests may be affected. Extending protective jurisdiction, it is argued, therefore becomes lawful. Indeed, it is difficult to argue that the destruction of Flight 103 has not affected U.S. interests. Certainly, the United States' threat to suspend China's most-favored-nation trading status if it had vetoed the Libyan-related resolutions exhibits the degree to which the Bush Administration was committed to this course in U.S. foreign policy.[88] Under this interpretation, extraterritorial claims have standing.

The principle of universal jurisdiction for the crime of aircraft sabotage has been internationally codified in the Montreal Convention. International law recognizes that the world community universally condemns such illicit behavior. In fact, under the Montreal instrument, aircraft saboteurs are effectively branded *hosti humani generis*, or enemies of humanity.[89] Consequently, States bear the duty to capture, try, and punish any offender on behalf of the international community, irrespective of territorial or nationality links.

The last principle, that of passive personality, represents the most polemical basis on which to prescribe U.S. jurisdiction under international law. This view assigns a State jurisdiction over its nationals regardless of where the offense is committed.[90] While still polemical as a theory, U.S. courts have come to recognize the legitimacy of the passive personality principle under special circumstances.[91] In fact, the *Third Restatement of Foreign Relations Law of the United States* specifically recognizes this principle when applied to terrorist and other organized attacks against a State's nationals by reason of their nation-

86. For discussion, see Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1092-97 (1974).

87. *See, e.g.*, J.J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 209-10 (1983).

88. *See* Paul Lewis, *China Is Warned Not to Veto Plan to Place U.N. Sanctions on Libya*, N.Y. TIMES, Mar. 28, 1992, at A1.

89. Montreal Convention, *supra* note 72, art. 5 (2).

90. THIRD RESTATEMENT, *supra* note 60, § 402, cmt. g.

91. *See, e.g.*, United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984) ("Jurisdiction may also be obtained under the passive personality principle over persons or vessels that injured the citizens of another country."); United States v. Marino-Garcia, 679 F.2d 1373, 1381 (1972) (affirming federal court jurisdiction over a defendant who shot a U.S. Drug Enforcement Agency official in Colombia).

ality.[92] Although the passive personality notion remains controversial, when used in conjunction with other jurisdictional principles, it can bolster claims of extraterritorial jurisdiction.

C. *Jurisdiction under Treaty Law—the Montreal Convention*

The 1971 Montreal Convention embodies the last in a trilogy of multinational civil aviation conventions.[93] Kin to the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft[94] and the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking),[95] the Montreal Convention made acts of aircraft sabotage and related acts against air navigational facilities an international crime. Specifically, Article 1, paragraph 1 provides:

> Any person commits an offense if he unlawfully and intentionally. . .:
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight[.][96]

Paragraph 2 of the Montreal instrument further stipulates:

> Any person also commits an offense if he:
> (a) attempts to commit any of the offenses mentioned in paragraph 1 of this Article; or

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92. THIRD RESTATEMENT, *supra* note 60, § 402, cmt. g.

93. Montreal Convention, *supra* note 72. In 1963, the international community met in Tokyo to sign the first of three important civil aviation conventions. The 1963 Tokyo Convention was an attempt to curb the growing incidents of aircraft seizures. This convention was not a formal attempt to define international crimes against aircraft, nor was it designed to be a deterrent against hijacking or aircraft sabotage. Instead, it simply obliged Contracting States to take certain steps against threats and acts of violence against civil aviation. Tokyo Convention, *supra* note 84.

The Tokyo Convention left many questions unanswered concerning custody and prosecution of offenders. Because international hijacking and aircraft sabotage were not international crimes, States in which the offenders sought refuge either could not prosecute because the incident did not occur in their jurisdiction, or were forced to prosecute the suspects for less-serious offenses committed in the course of the act.

The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft [hereinafter Hague Convention] appears to deal with some of these problems. Unlike the Tokyo pact, the Hague Convention developed a framework of international law designed to make the offense of hijacking a universal crime. Through the principle of *aut dedere aut judicare*, drafters attempted to bring the offense of unlawful seizure within the normal legal process of the Contracting State. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art 7, 22 U.S.T. 1641, 860 U.N.T.S. 105, 109. This provision is repeated verbatim in the Montreal Convention, art. 7. *See infra* note 100 and accompanying text.

94. Tokyo Convention, *supra* note 84.

95. Hague Convention, *supra* note 93.

96. Montreal Convention, *supra* note 72, art. 1, para. 1.

(b) is an accomplice of a person who commits or attempts to commit any such offense.[97]

Articles 5, 7, and 8 help ensure jurisdiction, enforcement, and adjudication. Article 5(2) introduces the bite of universal jurisdiction:

> Each Contracting State shall likewise *take such measures as may be necessary to establish its jurisdiction over the offences* mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.[98]

Article 7 complements this provision by fixing enforcement. It binds a Contracting State to prosecute the offender if extradition[99] is waived:

> The Contracting State in the territory of which the alleged offender is found shall, *if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.* Those authorities shall take their decisions in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.[100]

Finally, Article 8 furnishes the necessary conduit to ensure the desired end of extradition, irrespective of whether a separate bilateral extradition treaty exists. Put simply, this section permits the Montreal Convention to function as a multinational extradition treaty among the Contracting States.[101] To this end, Article 8 provides. . .:

> (2) If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option *consider this Convention as the legal basis for extradition* in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
>
> (3) Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.[102]

Significantly, both the United States and Libya are contracting parties to this convention. Presumably then, aircraft sabotage and other related acts are held to be international crimes under the municipal

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97. *Id.* art. 1, para. 2.

98. *Id.* art. 5, para. 2 (emphasis added).

99. Although the word "extradition" is not specifically mentioned, Article 7 makes clear that this is the only acceptable alternative to prosecution.

100. Montreal Convention, *supra* note 72, art. 7 (emphasis added).

101. NANCY DOUGLAS JOYNER, AERIAL HIJACKING AS AN INTERNATIONAL CRIME 198 (1974).

102. Montreal Convention, *supra* note 72, art. 8 (emphasis added).

codes of both States. The international community, however, paid surprisingly little attention to the Montreal Convention's application to the Libyan indictments.[103]

To summarize, the United States' exercise of jurisdiction in requesting extradition of the two Libyan suspects is supported by the domestic Aircraft Sabotage Act, the customary international law theories of floating territoriality, the protective principle, universality, and passive personality, as well as by specific relevant provisions in the Montreal Convention, to which both the United States and Libya are parties.

IV. OBSTACLES TO EXTRADITION

Even when a State requesting extradition stands on solid jurisdictional grounds, such as the United States in the Lockerbie case, surrender often is thwarted. This is due in part to a number of factors inherent in the extradition process—concerns over double jeopardy, double criminality, extradition of nationals, political sovereignty, and the principle of *aut dedere aut judicare*—that contribute to flaws in the extradition process itself. Customary extradition standards exist because most modern bilateral extradition treaties habitually recognize and incorporate many, if not all, of these fundamental principles.[104] The prospects of obtaining surrender of the accused Libyan nationals may be explored through this traditional legal framework.

A. *Double Jeopardy and Double Criminality*

The principle of double jeopardy aims to protect individuals against a second prosecution for the same offense after acquittal or conviction, as well as against multiple punishments for the same offense.[105] The requested State does not have to extradite persons who have been prosecuted in that State for acts for which extradition is

103. The press made scant mention of the Montreal Convention. For an exception, see Lewis, *Libya Unyielding Despite U.N. Demand*, *supra* note 3, at A8.

104. *See* THIRD RESTATEMENT, *supra* note 60, § 475, cmt. f. In the absence of an international legislature, customary law often expresses the will of States. Predicated on State practice, customary norms, such as those reflected in extradition law, constitute flexible facets of international law. Customary norms possess two cardinal qualities: (1) the nature of the rule must be adequately defined; and (2) the said practice must be tacitly, or explicitly accepted by a sufficient, though unspecified number of states. Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm Creation*, 11 CALIF. W. INT'L. L.J. 445, 457-58 (1984). *See also* H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972) (examining the role of custom in the codification of international law). In the case of extradition, absent a treaty to the contrary, States are not bound to surrender their nationals under international law.

105. BLACK'S LAW DICTIONARY 491 (6th ed. 1990).

being sought, irrespective of a verdict of conviction or acquittal. The rule is designed to avoid double trial and double conviction. A person tried for a crime in one State may not be tried repeatedly for the same crime in that State or in other States. This principle is rooted in municipal law and has correspondingly been accepted as a customary norm upholding the international extradition system.[106] States normally refuse to extradite a fugitive if that suspect has already been prosecuted in the host state on the charges brought by the requesting State. Generally, the act constituting the offense, rather than the denomination of the crime, determines the condition of double jeopardy.[107]

The principle of double criminality is similar to double jeopardy. The double criminality principle maintains that the crime for which extradition is requested must be a serious crime both in the requesting State and in the State to which the fugitive has fled.[108]

Libya has not prosecuted or announced charges against the two suspects in the Lockerbie bombing, nor are any proceedings along those lines formally under way. Double jeopardy rules therefore are not applicable to Libya's custody of the two men indicted for the Pan Am Flight 103 bombing.[109]

B. *Non-extradition of Nationals*

States generally are not required to surrender their own nationals for extradition in the absence of a bilateral treaty to that effect.[110] Although no definitively codified international law exists, this practice emerged during the early nineteenth century when continental European States refused with regular uniformity to extradite their citizens.[111] Moreover, the persistent refusal by many States to surrender their nationals may evolve into a customary norm.[112]

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106. THIRD RESTATEMENT, *supra* note 60, § 476, cmt. c.

107. *Id.* § 476, cmt. c.

108. *Id.* § 476, cmt. d.

109. An interesting hypothetical worth considering would involve a Libyan decision to prosecute the suspects municipally, despite Resolution 731, and a trial resulting in a not-guilty verdict. Would U.S. federal courts allow a second trial for the same offense? Or might the courts not recognize the judicial authority of the Libyan court? These issues remain unanswered.

110. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 289-90 (6th ed. 1992).

111. Robert W. Rafuse, The Rule of Extradition of Nationals 4 (1937) (unpublished Ph.D. thesis abstract, University of Illinois (Urbana)) (on file with the *Michigan Journal of International Law*). *See also* VON GLAHN, *supra* note 110, at 289.

112. Even if nonextradition of nationals were to become accepted as customary international law, the principle still could be overridden by subsequent international treaty agreements providing for such extradition.

The justification appears to be based on two premises. First, most States presumably have enacted municipal provisions for the punishment of citizens who commit offenses abroad; hence, no need exists for extradition.[113] Second, some scholars contend that a superior right of trial belongs to the country of which the fugitive is a citizen.[114] Indeed, justice is perhaps best served when the accused is tried by his fellow nationals under a familiar judicial system, rather than by foreigners who may consciously or unconsciously hold cultural or political biases. Furthermore, judges may be unable to dispense impartial justice to their foreign defendants because of disparate penal laws and dissimilar judicial institutions between States.[115]

Yet, in many ways, the accepted tendency against extraditing nationals reflects cultural xenophobia. People tend to view different judicial systems with suspicion and impaired credibility. In any event, the non-extradition of nationals is legally codified in the constitutions of certain States, as well as in many bilateral extradition treaties, and is practiced even when such legal agreements lack any specific non-extradition clauses.[116]

Furthermore, non-extradition of nationals is widely recognized as lawful under customary international law. Consequently, this principle presents a formidable obstacle that the United States must overcome in its attempt to gain custody of the accused Libyan nationals. The Libyan government may lawfully refuse extradition of its nationals if that policy is consonant with its own domestic law.

C. *The Political Offense Exception*

Most bilateral extradition treaties and international conventions contain exceptions for "political offenses."[117] Although defining pre-

113. *See* VON GLAHN, *supra* note 110, at 289.

114. *Id.*

115. Rafuse, *supra* note 111, at 12-13. This was partially the reasoning of Judge El-Kosheri in his dissenting opinion in the recent Libyan case against the United States in the International Court of Justice. *See* Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 4, 216 (Apr. 14) (El-Kosheri, J., dissenting) [hereinafter Lockerbie Case].

116. Rafuse, *supra* note 111, at 3-4.

117. The standard political offense exception in bilateral treaties with the United States reads:

> Extradition shall not be granted under this treaty in any of the following circumstances:
> (1) When the offense for which the extradition is requested is a political offense or when it appears that the request for extradition is made with a view to prosecuting, trying, or punishing the person sought for a political offense.

Extradition Treaty, Mar. 3, 1978, U.S.-Japan, art. IV, § 1 (1), 31 U.S.T. 892, 895-96 (entered into force Mar. 26, 1980). *See also* I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 166-93 (1970); MARJORIE WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 15 (1968).

Note that the United States and the United Kingdom supplemented their extradition treaty

cisely what constitutes a "political offense" remains polemical, governments generally are not required to extradite fugitives accused of committing such acts.[118] Since "terrorists" by definition are politically motivated offenders,[119] the political offense exception is a prickly impediment to extradition in terrorist cases.

Specifically, the political offense doctrine allows States to block extradition on grounds that the acts were committed for a political purpose or with a political motive, and permits governments to protect their own nationals against extradition to other States that may be politically biased against those individuals.[120] As one commentator observed:

> The exception aims to protect accused persons from political persecution and unfair trials. Therefore, any successful punitive scheme for control of international offenses must either overcome the need for the political exception or accommodate it. The political offense exception protects a legitimate state interest which cannot be overlooked in the effort to suppress indiscriminate violence.[121]

This political offense doctrine originally was designed to protect the rights of the accused and to foster the interests of States in remaining neutral toward other States' disputes.[122] The exception was supposedly limited to "pure" political offenses—those acts directed against the sovereign or other political institutions, absent the usual elements of a common crime.[123] Over time, however, the doctrine came to shelter many violent acts as "relative" political offenses committed in connection with a political cause or struggle for national liberation.[124] Unfortunately, manifold misuses of this legal precept have encouraged unlawful clandestine behavior to the detriment of the world community.

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in 1985 to remove serious terrorist offenses from the list of political offenses. Supplementary Extradition Treaty, June 25, 1985, U.S.-U.K., Hein's No. K.A.V. No. 2053, *amending* 28 U.S.T. 227, *reprinted in* 24 I.L.M. 1105-06 (1985).

118. THIRD RESTATEMENT, *supra* note 60, § 476 (2). *See also id.* at cmt. g.

119. *See generally* Emil Konstantiov, *International Terrorism and International Law*, 31 GERMAN Y.B. INT'L L. 289, 295-97 (1988) (arguing that the term "terrorism" has political rather than legal significance).

120. Alfred H. Novotne, *Random Bombing of Public Places: Extradition and Punishment of Indiscriminate Violence Against Innocent Parties*, 6 B.U. INT'L. L.J. 219, 230 (1988).

121. *Id.* at 230.

122. *See* CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHT OF THE INDIVIDUAL WITH THE PUBLIC INTERNATIONAL ORDER 2-4 (1980).

123. BASSIOUNI, *supra* note 58, at 391-92. The classic examples of "pure" political offenses are treason, sedition and espionage. *See* Manuel Garcia-Mora, *Treason, Sedition, and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65 (1964).

124. *See* BASSIOUNI, *supra* note 58, at 394-97.

1. Terrorism and Political Offense Exception Boundaries

National courts have developed three separate tests to determine the relative merits of the political offense exception, all of which have been used to deny extradition of suspected terrorist offenders. First there is the "political incidence" test, which was developed more than a century ago in *In re Castioni*.[125] In denying a Swiss extradition request made in connection with the murder of a Swiss official during an armed seizure of a canton's municipal palace, the British court held:

> Fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. . . . [A]n act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented.[126]

Shortly after deciding *Castioni*, the court refined the political incidence test in *In re Meunier*.[127] Meunier, an avowed anarchist, was charged with bombing a Paris cafe and an army barracks, causing two deaths. The British court decided to extradite Meunier, explaining:

> [I]n order to constitute an offence of a political character, there must be two or more parties in the State. . . . [T]he party with whom the accused is identified by the evidence, and by his own voluntary statement, namely the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens.[128]

Meunier modifies *Castioni* by requiring that a legitimate political purpose must motivate the offense. No less salient is the finding that extradition is permissible for violent acts which harm only private citizens.

The failure to set minimum standards for determining so-called "political crimes" creates empirical difficulties for applying the political incidence test. Such minimum standards appear necessary to diminish indiscriminate violence in society's quest for a more humanitarian world order. If humanitarian protections exist during wartime, then why should such protections not exist during peacetime? Humanitarian protection should apply both to the law of war and to the law of peace.[129] In sum, "humanitarian law embodies a

125. 1 Q.B. 149, 166 (1891).

126. *Id.* at 166, 167.

127. 2 Q.B. 415 (1894).

128. *Id.* at 419.

129. Novotne, *supra* note 120, at 227.

process of setting minimum standards of conduct to be applied under all circumstances."[130]

Following both the letter and spirit of the 1949 Geneva Conventions, an indiscriminate attack on a civilian population constitutes a grave breach of Protocol I to the conventions, especially if launched with the knowledge of or intent to cause excessive loss of life.[131] It thus seems absurd that an offense such as the Pan Am Flight 103 bombing should receive political incidence protection when that same act would violate the international laws of war. Indeed, the legal principles of proportionality and necessity, particularly as set out in the Geneva Conventions, could apply as readily to acts of State-sponsored terrorist violence as to open battlefield combat, because the use of force is no more disordered or unmanageable in peacetime than in wartime.[132] This approach, nevertheless, poses far more difficulty in practice than it implies in theory.[133]

Other standards for legitimizing the political offense exception similarly do little to ensure that terrorists are brought to justice. For example, France's "injured rights" test[134] turns on whether the requesting State seeks extradition because its rights were injured by a criminal act. That is, French courts tend to deny extradition when they determine that a State wishes to punish an offender for injuries inflicted on the State.[135] While this standard may seem narrower than the political incidence test, in practice French courts reserve nearly unfettered discretion to examine the offender's motivation, the nature of the crime, and the means-ends relationship between the crime and the political end to be achieved.[136] In reality, therefore, the injured

130. The Committee on International Terrorism stated in its fourth Interim Report:

> There is no reason to insulate insurrectionists or other groups from the punishment to which soldiers may be subjected. . . . There is no valid reason in theory or practice why states should be willing to concede to politically motivated foreigners a license to commit atrocities while saddling their own organized armed forces with the restraints contained in the 1949 Geneva Conventions against committing the same atrocities.

Committee on International Terrorism, 4th Interim Report 10-11 (1981).

131. *See* Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205, 225 (1977).

132. Novotne, *supra* note 120, at 229.

133. Successful enforcement of humanitarian law during times of war is difficult enough. Absent formal conditions of interstate belligerency, the international right of humanitarian protection under the laws of war remains subsumed to domestic law; hence, its implementation becomes neither practical nor automatic.

134. BASSIOUNI, *supra* note 58, at 425-26.

135. *See id.*

136. *See* Thomas E. Carbonneau, *French Judicial Perspectives on the Extradition of Transnational Terrorists and the Political Offense Exception*, *in* INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 76 (Richard Lillich ed. 1981).

rights test serves more as a thin veil through which French officials pursue policy prerogatives than as a purposeful dictate of international or municipal law.[137]

A third gauge for the political offense exception is the "predominance" test.[138] To trigger an exception under this test the political elements of a crime must predominate over common criminal elements.[139] Clearly, this test suffers from malleability and affords too many opportunities for political considerations to overwhelm the demands of justice.[140] Still, most continental European States have adopted this test to maintain control over foreign policy, without the encumbrances of law and justice.

These three standards earmarking the political offense exception appear sufficiently flexible to include terrorist acts and sufficiently ambiguous to legitimize a nation's foreign policy decisions. Governments and diplomats engage in diplomacy, not justice. As a consequence, the political offense exception poses a major hurdle to the international extradition process and can hinder the international community's efforts to bring terrorists to justice.

2. The United Nations' Response to the Lockerbie Incident

The United Nations, largely through the influence of Western States, provided an alternative to this political quagmire.[141] By implicating the criminality of the act, rather than the actor's intentions or motivations, authorities can indict terrorists as international criminals devoid of political cover. Apprehension, prosecution, and punishment, despite the political overtones of the offense, would then become compulsory under international law.[142]

The indictments for bombing Pan Am Flight 103 reflect this strategy by treating the two Libyan nationals, al-Megrahi and Fhimah, not as terrorists, but as alleged criminals who violated domestic and inter-

137. Thus, in the case of Willie Roger Holder and Mary Katherine Kerkow, a French court denied the United States' request for extradition of two Americans who had hijacked a plane to Algeria and extorted $500,000 from the airline. The court held that the political offense exception applied because the hijackers had briefly alluded to two black militant leaders and had also asked for passage to Hanoi. Interestingly, Carbonneau has suggested that the French had used the exception as a cloak to express their disapproval of U.S. foreign policy in Vietnam. *See Extradition: Hijacking*, 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW § 5, 168-75 (1975). *See also* Carbonneau, *supra* note 136, at 76.

138. BASSIOUNI, *supra* note 58, at 436.

139. *See id.* at 436-38.

140. Findlay, *supra* note 47, at 13.

141. Joyner & Lenz, *supra* note 36, at 340-42.

142. *Id.* at 336-42.

national laws.[143] Indeed, legal linkage between the two Libyan suspects and terrorism is practically nonexistent.[144] This criminal status was a deliberate tactic to accomplish two objectives with one instrument. On the one hand, U.S. Justice Department officials avoided the entanglement of defining what constitutes a terrorist, thus undermining any Libyan political claim to refuse surrender. On the other hand, the U.S. indictment substantially circumvented the political offense exception because it focused on the alleged crimes of two Libyan nationals, rather than on terroristic acts by alleged Libyan terrorists. This position undercuts the Libyan argument for denying surrender based on political standing.

Hence, when considered within the Lockerbie framework, the political offense exception appears considerably less controversial than previous incidents involving acts of terrorist violence.[145]

D. *Aut Dedere Aut Judicare*

The principle of *aut dedere aut judicare* requires any State that denies an extradition request to pursue the allegations itself.[146] In effect, States must extradite or prosecute. Unfortunately, unless a State binds itself through formal agreement to this practice, it can purposefully permit suspected criminals to evade deserved punishment.[147]

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143. *See generally*, U.S. Indictment, *supra* note 2; Montreal Convention, *supra* note 72, art. 1, para. 1 (making acts of air sabotage and related acts against air navigational facilities an international crime).

144. The bombing of Pan Am Flight 103 has been repeatedly called a terrorist act, yet the indicted Libyans were not formally branded "terrorists." This dichotomy stems from the basic political quagmire over defining a terrorist. Although the Pan Am Flight 103 bombing has been called an act of State-sponsored terrorism by numerous Western officials, only two Libyan nationals have been indicted, not the Libyan government. The failure by the United States to publicly label these two Libyans as "terrorists" may have been an intentional means of circumventing the politically sensitive question of defining what a terrorist is, thus strengthening the U.S. case internationally. By approaching the situation in this manner, a definitional entanglement is avoided, and the case is bolstered legally.

145. Still, many Western officials view the bombing of Pan Am Flight 103 as an act of State-sponsored terrorism, irrespective of proper legal labels. White House Spokesman Marlin Fitzwater said, "This consistent pattern of Libyan-inspired terrorism dates from early in Qadhafi's leadership." Andrew Rosenthal, *U.S. Accuses Libya as 2 Are Charged in Pan Am Bombing*, N.Y. TIMES, Nov. 15, 1991, at A1. Fitzwater also stated, "[I]t was impossible to believe that the Libyan government was not involved and this was not a case of State-sponsored terrorism." Fletcher & Gill, *supra* note 24, at 1. Washington officials note that President Bush has consulted with British Prime Minister John Major and French President François Mitterrand in forging a "cooperative international response to this latest terrorist atrocity by Qadhafi's government." Rosenthal at A8. Yossi Olmert, head of the Israeli press office, in speaking of a possible Syrian involvement stated, "We are not surprised by the findings, it is what we call sub-contracting." Richard Beeston, *Israelis Suspect Cover-Up of Syrian Role*, THE TIMES (London), Nov. 15, 1991, at 2. "Sub-contracting" refers to a method of carrying out a terrorist attack.

146. While contained in certain international agreements, this doctrine is not an automatic customary rule of international law.

147. MURPHY, *supra* note 57, at 36.

Even when violent acts fall within the prescribed jurisdiction of an international convention, extradition is not always a simple matter. In fact *aut dedere aut judicare* may ensure little more than a facade of justice.

The principle of *aut dedere aut judicare* requires the home State merely to submit the case to the proper authorities; nothing requires the government to actually try the case.[148] In such cases, official investigations in the home State are likely to turn up insufficient evidence on which to indict the suspects. In the Lockerbie aerial incident, for example, Colonel Qadhafi has opined that the indictments of the two bombing suspects rely on evidence "less than a laughable piece of a fingernail."[149] He even suggested that Flight 103 was a victim of bad weather and happened to crash into a gas station.[150] Furthermore, according to the indictment, it was Libya's Minister of Justice, Izzel Din al Hinshiri, who purchased the detonators used to destroy Flight 103.[151] The prospects of such partiality and conflicting interests belie the need for a more objective, and certainly less self-serving, standard by which to judge the quality of evidence in international extradition requests.

The bare-bones prosecution requirement of *aut dedere aut judicare* represents one of several opportunities for political or foreign policy considerations to enter into and emasculate the multistage extradition process.[152] In fact, the formalities of the process itself afford interested parties numerous chances to exert political pressure on decisionmakers, even beyond any one State's self-interest in refusing any given extradition request. Indeed, State practice demonstrates the central role of political considerations in extradition decisions. In January 1977, for example, French counterintelligence agents arrested Abu Daoud, the man believed responsible for the 1972 attack on the

148. *See* Alona E. Evans, *The Apprehension and Prosecution of Offenders: Some Current Problems, in* LEGAL ASPECTS OF INTERNATIONAL TERRORISM 493-503 (Alona E. Evans & John F. Murphy eds. 1978).

149. *Qaddafi Scoffs at Demands for Bombing Suspects*, N.Y. TIMES, Nov. 29, 1991, at A11.

150. Chris Hedges, *Libya, Fearing Attack, Braces for Clash with West*, N.Y. TIMES, Feb. 19, 1992, at A9.

151. *See* U.S. Indictment, *supra* note 2, at paras. 10-11; *see also* Lardner, *supra* note 7; Graham, *supra* note 18, at 9.

152. Four steps generally constitute the extradition process: (1) a request must be presented through diplomatic channels; (2) upon receipt of an extradition request, the foreign government starts an investigation to determine if extradition is warranted; (3) if there exists sufficient evidence, the fugitive will be arrested and held until law enforcement agents arrive from the requesting state; and (4) the agents from the requesting state will take the suspect into custody and return him back to that state for trial. *See* VON GLAHN, *supra* note 110, at 286-87.

Israeli Olympic team at Munich.[153] Although West Germany had filed an extradition request and Israel's request was forthcoming, French authorities released Daoud after the Paris *Cour d'appel* dismissed both requests on "extremely technical legal grounds."[154] A number of commentators suggested that fear of terrorist retribution and concerns about Arab oil threats motivated the French decision.[155]

More recently, in October 1985, Egypt permitted the alleged seajackers of the *Achille Lauro* to leave for Tunisia, despite the existence of a valid extradition treaty with the United States and an obligation to extradite or prosecute under the International Convention Against the Taking of Hostages.[156] Commentators regarded Egypt's move as an effort to placate the Palestine Liberation Organization and other Arab nations.[157] Even West Germany, traditionally a strong ally of the United States, refused to extradite Mohammed Ali Hamadei, whom U.S. law enforcement officials indicted for hijacking Trans-World Airlines Flight 847, after Hezbullah terrorists seized two Germans in Beirut.[158] Coincidentally, the two hostages were released after Germany denied the United States' extradition request.[159]

Each successful terrorist act supplies encouragement for more terrorist acts in the future. Paradoxically, however, some terrorists have escaped legal prosecution because national authorities fear reprisals from other terrorists. Ironically, these are the very individuals whom authorities should strive most to prosecute.

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153. For details on this affair, see Carbonneau, *supra* note 136, at 66, 80-82. *See also* Recent Developments, *International Terrorism: Extradition*, 18 HARV. INT'L L. J. 467 (1977).

154. Carbonneau, *supra* note 136, at 81; Recent Developments, *supra* note 153, at 469.

155. *See, e.g.*, Carbonneau, *supra* note 136, at 81; Recent Developments, *supra* note 153, at 470.

156. International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. 46, at 245 (1980). For discussion of the *Achille Lauro* incident, see Christopher C. Joyner, *The 1988 IMO Convention on the Safety of Maritime Navigation: Towards a Legal Remedy for Terrorism at Sea*, 31 GERMAN Y.B. INT'L L. 230, 234-35 (1988); John Tagliabue, *Ship Carrying 400 is Seized; Hijackers Demand Release of 50 Palestinians in Israel*, N.Y. TIMES, Oct. 8, 1985, at A1; Bernard Gwertzman, *U.S. Intercepts Jet Carrying Hijackers*, N.Y. TIMES, Oct. 11, 1985, at A1.

157. Andrew L. Liput, Note, *An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice*, 9 FORDHAM INT'L L.J. 328, 348 (1986).

158. *See* James M. Markham, *Beirut Abductors Linked to Suspect*, N.Y. TIMES, Jan. 24, 1987, at A5.

159. The bilateral extradition treaty contained a "political offense exception." *See* Treaty Concerning Extradition, U.S.-F.R.G., June 20, 1978, 32 U.S.T. 1485, 1491, art. 4. *See also Terrorism—All Our Own Work*, THE ECONOMIST, Sept. 26, 1987, at 31.

V. CUSTOMARY LEGAL NORMS AND THE LIBYAN REFUSAL TO EXTRADITE

At first blush it appears that the United States' informal extradition claim against the two Libyan nationals has clear legal standing. Two precedent-setting U.N. Security Council resolutions support the U.S. request, as does an international convention to which both the United States and Libya are parties. The international community itself substantiated the legitimacy of the U.S. position by first adopting, and then supporting, the Security Council resolutions regarding the Lockerbie aerial incident.[160] Such action surely reflects the concerted temperament of the international community.

Yet, the Libyan government still refuses to surrender the two indicted men. Instead, Libya purportedly seeks to prosecute its nationals domestically. The Libyan government even took its case to the International Court of Justice,[161] arguing for predominant applicability of the Montreal Convention in the Lockerbie case.[162]

Libya's refusal to surrender its nationals actually rests on sound legal reasoning and has considerable merit. At no other time, absent armed conflict, has the United Nations so boldly sought to reach into the internal affairs of a Member State.[163] Not surprisingly, Libya defiantly refused the United States' surrender request, a rejection that has been couched in a legal rationale.

Underpinning the Libyan government's position is the contention that traditional State practice and current international law prescribe the right to waive extradition in favor of municipal prosecution.[164]

160. *See* Lewis, *Libya Unyielding Despite U.N. Demand*, *supra* note 3, at A8. *See also* Lewis, *Security Council Votes to Prohibit Arms Exports and Flights to Libya*, *supra* note 33, at A1.

161. For the decision of the Court, see Lockerbie Case, *supra* note 115. Lord Fraser of Carmyllie, Scotland's Lord Advocate, admitted that even though Interpol was circulating the warrants, it was unlikely the men would be arrested "in the normal way." A senior Libyan diplomat confirmed this saying, "Nobody surrenders his own nationals." Fletcher & Gill, *supra* note 24, at 1.

162. Libya argued before the World Court that Security Council Resolution 731 was adopted under the dispute settlement powers vested in Chapter VI of the United Nations Charter. Chapter VI resolutions, Libya argued, are not binding; therefore, the Montreal Convention should supersede the Security Council Resolution. Lockerbie Case, *supra* note 115, at 121. *See also id.* at 175-79 (Weeramantry, J., dissenting). The Court, however, dismissed this claim by stating that it does not have the authority to challenge Security Council decisions. *Id.* at 127-28.

163. Some developing States fear such an International Court of Justice precedent would open a Pandora's box of interference. Syria, apprehensive of its own reported involvement in sponsored terrorism, actively has sought Arab support in trying to break the Libyan sanctions. Some analysts have argued that al-Assad is publicly forfeiting his fledgling relationship with the West for fear of becoming the next Security Council target. Chris Hedges, *Syria Trying to Breach Air Embargo on Libya*, N.Y. TIMES, April 21, 1992, at A5.

164. Lockerbie Case, *supra* note 115, at 125-26. Although European courts historically have upheld a State's right not to extradite its nationals, the United States has chosen not to recognize this practice. Rather, U.S. courts have upheld the precept of territorial jurisdiction, or prosecu-

Libya's refusal to extradite its nationals has considerable support in contemporary customary international law.

Libya's core legal assertion is that the Montreal Convention is the "only appropriate convention in force between the Parties dealing with such [bombing offenses]," and that the United States should be bound by its legal obligations under that international instrument, including the obligation to respect Libya's right to pursue appropriate juridical measures towards establishing legitimate jurisdiction over the matter.[165] Certainly, under codified international law, the Montreal Convention extends to Libya the right to prosecute its own nationals. Article 7 requires a Contracting State to "submit the case to its competent authorities for the purpose of prosecution"[166] if it does not extradite an offender. Furthermore, Article 8 of the Convention calls on States to exercise extradition as subject to the conditions provided by the law of the requested State.[167] Extradition requests, therefore, lawfully may be denied based upon the nationality or political offense exceptions, should they appear in a bilateral extradition treaty.[168] Because Libya and the United States do not share an extradition treaty, customary norms, by default, become the legal conduit joining the two States.[169] Under contemporary international law, Libya's nonextradition of its own nationals clearly constitutes lawful behavior if it is sanctioned by Libya's own domestic legal norms. As maintained by the Libyan government, "Libyan law prohibits the extradition of Libyan nationals."[170]

Despite Libya's claims, the rest of the international community paid little attention to the Montreal Convention's application to the Libyan indictments,[171] which called the convention's credibility into question. Given the Convention's *raison d'être*, one must wonder why application of this instrument was seemingly overlooked. Perhaps the United States and United Kingdom were concerned about the Convention's "extradite or prosecute clause" and thus sought to avoid a

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tion at the scene of the crime. Even so, U.S. courts stand as a distinct minority in this practice. In fact, only the United Kingdom, the United States, and a few Latin American countries grant preeminence to the territoriality principle. These States have not always consistently followed this legal theory in practice. *See* VON GLAHN, *supra* note 110, at 289-90.

165. Lockerbie Case, *supra* note 115, at 121-22.

166. Montreal Convention, *supra* note 72, art. 7. *See also supra* note 100 and accompanying text.

167. Montreal Convention, *supra* note 72, art. 8.

168. JOYNER, *supra* note 101, at 199.

169. It is the practice of the United States to deny extradition in the absence of a treaty. 18 U.S.C. §§ 3181, 3184. *See also* THIRD RESTATEMENT, *supra* note 60, § 475, cmt. a.

170. Lockerbie Case, *supra* note 115, at 117.

171. *See supra* note 103.

public challenge to its legitimacy had the Libyan government refused to do either. Indeed, such a challenge might have led to intense international publicity which could have thwarted adoption of the Security Council resolutions, or impaired their effectiveness.

Whatever the case, customary law supports Libya's legal position. States requesting extradition must furnish sufficient evidence that the accused fugitive actually committed the crime.[172] This customary standard is often codified in bilateral extradition treaties[173] and is recognized as a contemporary norm in the international extradition process.[174] Yet, despite public requests from the Libyan government, the United States has thus far refused to turn over evidence supporting the indictments.[175] Although the U.S. Department of Justice has not openly articulated reasons for this refusal, its position may be justified by the need to protect intelligence sources. Nevertheless, even though the United States retains a duty under international law to provide the requisite evidence, the U.S. government has opted to skirt this customary norm.

Perhaps even more disturbing, independent investigations have suggested an alternative scenario challenging the Justice Department's case.[176] New evidence may support a 1989 FBI report suggesting that the rogue suitcase containing the Lockerbie bomb might have entered the baggage system in Frankfurt, Germany, and not in Malta as alleged in the indictments.[177] This alternative scenario asserts that it was Ahmed Jabril and the PFLP-GC that executed the operation at the behest of Iran. The motive, according to this theory, was not revenge for the accidental downing in 1987 of an Iranian airbus, as origi-

172. Under the specialty principle, the State requesting extradition must specify the crime for which the accused is to be extradited and try the individual only on the charges specified in the extradition request. Accordingly, the requesting state must supply sufficient evidence that the accused actually committed the crime. THIRD RESTATEMENT, *supra* note 60, § 477.

173. THIRD RESTATEMENT, *supra* note 60, § 476 (1) (a).

174. *Id.*, § 476, cmt. b.

175. Lewis, *After U.N. Condemnation, Libya Digs In*, *supra* note 3, at A8. Nor has anyone been officially mentioned as an informant in the case. In mid-September 1992, however, the French news magazine *L'Express* revealed that U.S. authorities were guarding a Libyan intelligence defector named Majid Giaka, who is believed to have been the inside source supplying evidence to support the U.S. indictment against the two suspects. Giaka was second in charge of the Libyan Arab Airlines Office in Malta at the time of the bombing. He worked directly for one of the indicted Libyans, Lamen Khalifa Fhima, and witnessed both suspects' preparations in making and planting the bomb in a suitcase on an Air Malta flight, after which it was put aboard Pan Am 103. Supposedly frightened by the bombing, Giaka reportedly fled Libya, contacted U.S. authorities, received a grant of asylum in the United States, and is currently in the witness protection program. *See* George Lardner, *Libyan Names as Informer in Bombing*, WASH. POST, Sept. 18, 1992, at A30.

176. *See* Roy Rowan, *Pan Am 103: Why Did They Die?*, TIME, Apr. 27, 1992, at 24.

177. *Id.* at 28.

nally suspected. Instead the motive was to assassinate the head of a top-secret U.S. army commando unit on the verge of rescuing U.S. hostages held in Lebanon.[178] Not surprisingly, the U.S. Attorney General's office has vehemently denied these suggestions, and the Justice Department stands by its indictments.

Wherever the truth lies, the hard public evidence against the two suspects seems porous, leaving the United States' case less credible than it first appeared. At the same time, international legal standards enhance Libya's position. This controversy over the evidence and the strength of the indictments exacerbates the uncertainty of blame in the Lockerbie incident and highlights deficiencies in the international extradition system.

VI. Implications of the Security Council Resolutions

While Libya's claims under international law may be credible, the U.N. Security Council's resort to resolutions signals new considerations for international extradition law. Despite past practice, the Security Council decided to treat Libya's refusal to surrender its nationals as a threat to the peace under Chapter VII of the U.N. Charter, notwithstanding the customary purview of international extradition law.

Except for the Montreal Convention's "extradite or prosecute clause," no existing mandate deprives Libya of the right to refuse an extradition request. The *aut dedere aut judicare* principle breaks down when the State refusing extradition does not make a good faith effort to prosecute the crimes itself. The Security Council's adoption of Resolution 731's strong exhortation that the Libyan Government should "immediately . . . provide a full and effective response to those requests so as to contribute to the elimination of international terrorism"[179] subtly implies that the council lacks faith in Libya's judicial system, or at least in its government.[180] The pejorative rhetoric espoused by Libyan government officials concerning the case, punctuated by allegations that its former Minister of Justice purchased the detonators used in the Pan Am Flight 103 bombing, have done little to assure the international community that authorities in Libya can conduct a credible trial.[181] More specifically, the Security Council would

178. *Id.* at 26-32.

179. S.C. Res. 731, *supra* note 4, para. 3.

180. The United States and its supporters have argued that the Libyan government cannot try people whom it sent to destroy the airliners. Paul Lewis, *Libya Is Expected to Get U.N. Demand on Bomb Suspects*, N.Y. Times, Jan. 21, 1992, at A1, A6.

181. Colonel Qadhafi's intransigence eased the adoption of the Security Council resolutions.

not have adopted the resolutions, nor have been as adamant in seeking a compromise, if it had believed the indicted men would have been tried in their home State. Given the dearth of international confidence in Colonel Qadhafi and the Libyan government in general, trial and prosecution by Libya of the accused suspects was considered a less than acceptable option.

Through Security Council Resolution 748, the United Nations imposed sanctions on Libya[182] for national behavior that had been considered internationally lawful in the past, that is, its refusal in the absence of a treaty to surrender its nationals for extradition to another State for trial. In the case of the Pan Am Flight 103 bombing, however, such refusal by the Libyan government became tantamount to its refusal to "provide a full and effective response" to U.S. and British requests that Libya "surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials; disclose all it knows of this crime . . . and allow full access to witnesses . . .; [and] pay appropriate compensation."[183]

It is fair to say that Security Council resolutions 731 and 748 may contravene the established customary legal practice of conducting extradition through bilateral treaty relationships and appropriate provisions in multilateral instruments. This normative conflict highlights a contradiction drawn between State practice and institutional authority: with whom does ultimate legal authority lie for deciding extradition qualifications? Granted, the quasi-universal character of General Assembly resolutions may reflect changing normative attitudes within

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Libya has proposed a list of steps it wants the United Nations to take to eliminate what it calls the "causes of terrorism," including a ban on hunting, boxing, and wrestling, as well as reversing the flow of rivers so the waters can be used for irrigation rather than flowing into the sea. Such odd rhetoric by a head of state does little to instill credibility in the Libyan claim that domestic prosecution will be in good faith. Lewis, *Libya Is Expected to Get U.N. Demand on Bomb Suspects*, *supra* note 180, at A6.

182. As provided in Resolution 748, the Security Council decided "on 15 April 1992 all States shall adopt the measures set out below, which shall apply until the Security Council decides that the Libyan Government has complied with paragraphs 1 and 2 above [i.e., the requests for surrender of nationals made by the United States and the United Kingdom]." S.C. Res. 748, *supra* note 5, para. 3. The sanctions included:

(1) denying landing, take-off, and fly-over rights to aircraft with Libya as their origin or destination. *Id.*, para. 4 (a);

(2) prohibiting the supply of aircraft or aircraft parts to Libya. *Id.*, para. 4 (b);

(3) prohibiting the sale of arms and technical assistance to Libya. *Id.*, para. 5;

(4) reducing staffing at diplomatic posts in Libya. *Id.*, para. 6 (a);

(5) preventing the operation of all Libyan Arab Airlines offices. *Id.*, para 6. (b); and

(6) taking all appropriate steps to deny entry or expel Libyan nationals because of their involvement in terrorist activities. *Id.*, para. 6 (c).

183. Joint Declaration of the United States and United Kingdom, *in* STATEMENT ISSUED BY THE GOVERNMENT OF THE UNITED STATES ON 27 NOVEMBER 1991 REGARDING THE BOMBING OF PAN AM 103, U.N. Doc. S/23308 1991, *reprinted in* 31 I.L.M. 722 (1992).

the world community.[184] But what about binding Security Council resolutions that clearly contravene established State practice? Herein lies the perceived rub: we are left a conflict between sovereign national authority and compulsory acceptance through international consensus, as determined by the distinct minority of governments in the council.

The two Security Council resolutions might be perceived as undercutting the established legal framework concerning international acts of aircraft sabotage because they circumvent traditional means of extradition. Similarly, such actions might be viewed as signaling concern over the Montreal Convention's lack of efficacy in bringing international criminals to justice. Unfortunately, one might interpret the Security Council's deliberate decision to take extraordinary actions, rather than to implement an acknowledged instrument of international law, as a substantial loss of faith in the Montreal Convention's authority. Indeed, the danger of such action lies in the fact that instruments of international law may become tools of convenience, rather than treaties of necessity.

A more constructive approach to considering the Security Council's role in prosecuting the Lockerbie bombing, however, involves viewing the council as an ancillary facilitator of current extradition processes, rather than as a permanent replacement of previous practices. Given the U.N. Charter's Chapter VII exceptions to Article 2(7), the Security Council has the authority to determine whether a situation is so severe that it constitutes a threat to the peace, a breach of the peace, or an act of aggression.[185] Therefore, the Security Council has the authority to take up such matters, even those which normally might fall under national jurisdiction. This power of the Security Council, and its application to the Libyan situation, affects neither the broad approach to terrorism nor the internationally accepted standard of extradition procedures. Instead, the Security Council's actions demonstrate that the extreme severity of the Lockerbie situation compelled the council to intercede and preempt the usual course of extradition law and requisite procedures.

Were these actions performed repeatedly, one could persuasively argue that the Security Council was deviating and detracting from the standard conventional approach to extradition. But if the Lockerbie

184. *See* Joyner, *supra* note 104, at 445-47.

185. Article 2, para. 7 of the U.N, Charter provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

case merely represents an exception made by the Security Council, then contemporary extradition law is perhaps operating on two levels.

The first level, standard bilateral and multilateral treaty approaches to extradition law, covers most of the cases. The Security Council's second-level intervention occurs only after international conditions become so intricate, such as in the Lockerbie case, that the traditional treaty approach proves unworkable. When the Security Council decides to take action in such cases, its decisions simply preempt the normal law. Thus, intercession by the Security Council in the Lockerbie case does not replace international extradition law, nor violate, expand, rewrite, or even alter it. Rather, in such cases, the law merely operates at a different level through the internationally sanctioned ways and means of the United Nations. Importantly, as long as such second-level interventions are rare and infrequent, international extradition law will continue to operate broadly on a normal course.[186]

The U.N. Security Council's Lockerbie resolutions may also foreshadow a move toward greater collective decisionmaking in the formation and execution of international law. Sovereign States traditionally have created international law to serve their own self-interest.[187] The substance of international law stems from voluntary action by States through express treaty agreements, tacit customary acquiescence, and the assertion of generally accepted guidelines for controlling behavior in specified ways.[188] Under this classic framework, States have remained the dominant actors in the international community and the final arbiters in determining where their interests lie.

This Westphalian concept is etched into the U.N. Charter itself[189] and has provided the main outline for structure and process within the contemporary world community, as is amply demonstrated by the premium given to peace over justice in the Charter's application. In the wake of two world wars and the omnipresent threat of a nuclear world war, one can rationalize this unbalanced power tilt. But the Cold War is now over, and the Westphalian concept of absolute State sovereignty is undergoing challenge from the community conception espoused by

186. The authors are indebted to Professor Anthony Arend for his help in fleshing out these points.

187. *See* Christopher C. Joyner, *The Reality and Relevance of International Law, in* THE GLOBAL AGENDA: ISSUES AND PERSPECTIVES 202-15 (3rd ed., C. Kegley and E. Wittkopf eds. 1991).

188. Richard Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order, in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 121 (Richard Falk et al., eds. 1985).

189. Article 2, para. 1 of the U.N. Charter provides: "The Organisation is based on the principle of sovereign equality of all its Members."

the U.N. Charter. Indeed, Charter law obliges States to defer to community judgment in a situation of conflict and violence.[190]

Such a paradigm has already eroded absolute State sovereignty in certain key areas such as human rights, democracy, humanitarian assistance, and disarmament.[191] As Professor Richard Falk observed, "The Charter conception of international order rests heavily upon the capacity of the international community to mount collective action based on a fair-minded interpretation of certain shared norms."[192] Consequently, authoritative formulation for governing norms has become crucial for encouraging impartial acceptance of international legal standards. National governments may still be the basic source of order in international society, but the United Nations has awakened during the 1990s from its four-decade supranational slumber.

Implications of this normative synthesis are visible within entities seeking the most change, especially in the General Assembly. This international organ wields its authority under Article 13 of the U.N. Charter[193] to suggest normative change through adoption of resolutions. Although resolutions passed by the General Assembly are not legally binding, they may demonstrate the will of international consensus, and can provide the genesis of development of customary and treaty-based international law.[194]

A second implication stems from the fact that certain international legal issues are considered "low politics." Within this context, cooperative action through consensus has become an accepted practice. States demonstrate such behavior daily when they abide by aviation

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190. Article 51, the critical self-defense provision, states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. *Measures taken by Members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*

U.N. Charter, art. 51. (emphasis added).

191. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 62 (1982).

192. Falk, *supra* note 188, at 126.

193. Article 13 of the U.N. Charter provides:

> 1. The General Assembly shall initiate studies and make recommendations for the purpose of:
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> a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;
>
> b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> 2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.

194. *See* Joyner, *supra* note 104, at 452-53, 456-58.

conventions, trade rulings, telecommunications agreements, diplomatic norms, and the like.

Third, the United Nation's role in conflict resolution is gaining strength. During the Cold War, power politics and ideological prerogatives tended to dictate conflict resolution. Consensus received little attention. The United Nations became a convenient forum for the superpowers to assert their sovereign power and influence. The Charter concept was treated more or less as simply a game of ideological follow-the-leader. Consequently, international authority was not delegated between various interests in the international community, but instead was vested mainly in the interests of two global superpowers. Today, the United States remains the sole superpower, and the Security Council is no longer automatically hamstrung by ideological vetoes. Conflict resolution therefore has become more viable through application of relevant Charter provisions such as Chapter VI, articles 33-38 (the pacific settlement of disputes), and Chapter VII, articles 39-51 (action with respect to threats to the peace). Indeed, U.N. Security Council resolutions pertaining to both the 1991 Persian Gulf War[195] and the Pan Am Flight 103 bombing demonstrate this end. Both episodes arguably furnished classic cases for the Security Council to extend lawfully its authority and to work to resolve international situations in the manner originally envisioned by the U.N. founders.

Collective adoption of the Pan Am Flight 103 resolutions reaffirmed the end of the Cold War and highlighted the viability of the Charter conception. It is also conceivable that the resulting reverberations may produce a shift toward a more balanced interpretation of the Charter itself. Might deliberate interference by the Security Council into Libya's internal affairs intimate the rise of a new premium on national justice over international peace? At the very least, it is interesting to speculate that these two principles might be inextricably woven into a nexus wherein, absent justice, peace is threatened and absent peace, there can be no justice.

The Security Council's decision in the Lockerbie incident to implement Chapters VI and VII of the U.N. Charter—and directly to challenge customary international norms—reflects the legal gravity given to the Pan Am Flight 103 incident. In fact, such strong, decisive action should emphatically alert Libya and all nations that State sovereignty cannot override the authority of Security Council resolutions. Indeed, Article 25 in the U.N. Charter bluntly reaffirms this point in

195. For discussion of the Persian Gulf War resolutions, see Christopher C. Joyner, *Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq*, 32 VA. J. INT'L L. 1, 8-12 (1991).

declaring: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[196] Consequently, in the case of the Lockerbie bombing, the Security Council clearly established itself as the final arbiter for the international legal community.[197]

Given this fiat by the Security Council, Libya is bound under its U.N. Charter obligations to carry out its binding international responsibility to meet the demands of Security Council resolutions 731 and 748. Irrespective of national legal claims and customary international practice, the Security Council's prescription overrides counter-arguments that Libya put forth. In fact, Article 103 of the U.N. Charter makes this conclusion plain:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail.*[198]

This point was twice substantiated in the Lockerbie case. First, the International Court of Justice on April 14, 1992, effectively ruled that it did not have proper authority to adjudicate executive action taken by the Security Council.[199] Second, near-unanimous success existed in securing agreement on enforcing international sanctions against Libya. In both instances, the world community upheld the legitimacy of the international consensus approach embodied in the Charter and rejected as unlawful Libya's refusal to surrender its nationals under the more traditional national sovereignty approach.

So long as governments are willing to divorce political intent from unlawful behavior, they can indict terrorists as international criminals. The international extradition system thus can emerge as a more credible tool in the international legal community. This development is

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196. U.N. Charter, art. 25.

197. This fact is highlighted in the Lockerbie Case, in which the International Court of Justice, in an 11 to 5 opinion, held:

> Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention; . . . .
>
> Whereas, furthermore, an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United States by virtue of Security Council resolution 748 (1992); . . .
>
> The Court . . . *Finds* that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

Lockerbie Case, *supra* note 115, at 126-27.

198. U.N. Charter, chap. 16, art. 103 (emphasis added).

199. *See supra* note 197, and accompanying text.

ascribable to a precedent-setting change within the international extradition process. Security Council resolutions amount to public declarations that remind member governments who the supreme sovereign is in the international extradition system. At the very least, this change creates a credible framework for deterring those governments that believe they can harbor international criminals with impunity. Furthermore, these U.N. actions reveal that the Security Council is able to act with greater effectiveness now that it has been freed from the disabling effects of the Cold War.

CONCLUSION

The past reluctance of the world community to resolutely condemn and concertedly counter terrorist activities—aggravated by a passively enforced international extradition process—has posed a serious obstacle to obtaining custody of terrorists through traditional extraterritorial means. The Lockerbie incident highlights the fundamental flaw in prosecuting terrorist offenses through bilateral extradition treaties and multilateral conventions: States that sponsor terrorism can refuse to sign such pacts, ignore the agreements they do ratify, and hide behind customary legal technicalities, such as nonextradition of nationals or the political offense exception. Known and suspected terrorists, therefore, may elude trial and punishment unless the State seeking extradition can successfully apprehend these international criminals in extraordinary ways.

But as of March 31, 1992, sovereign authority within the extradition system is no longer absolute. The concerted action of the Security Council to compel some form of legal redress by Libya has served notice to other member governments that the supreme sovereign within the international community is not necessarily the authoritative State. Instead, sovereign authority is tending toward the collective will of the United Nations, as articulated by the Security Council through its various legally binding resolutions.

Although Libya refused to surrender the two suspects in the bombing of Pan Am Flight 103, measures taken by the Security Council suggest the willingness of the United Nations to challenge State-sponsored terrorism with more than mere rhetorical condemnation. Even if the council's resolutions prove ineffective, such action by the United Nations can pave the way for stricter measures—such as tighter, broader economic sanctions, and perhaps even military force—that bear the stamp of world approval through international consensus.

International criminal law evolves, as does the international penal system and the nature of the international criminal. As a result, the

international legal community may become more prone to divorce political intent from unlawful international behavior. Such a development could present the means for overcoming various obstacles in the extradition process. Clearly the Aircraft Sabotage Act, the Montreal Convention, and the Lockerbie-related Security Council resolutions suggest that international extradition law is headed in this direction.

The bombing of Pan Am Flight 103 not only produced precedent-setting reverberations within the international extradition system, but also reaffirmed the legitimacy of the nascent international criminal system. In the past, attaining international peace often took priority over securing international justice. That choice may be regrettable. Even so, it appears clear that obligatory resolutions by the U.N. Security Council represent a long-awaited first step toward ensuring that justice is not always blind, and that murderers will not go unpunished. If this proves to be the trend, the role of extradition in international law will undoubtedly be strengthened by the painful Lockerbie experience. More than that, the emerging status of international criminal law will have secured greater respect and, hopefully, fostered an even greater proclivity for nations to follow it.